No. 17-432

In The
Supreme Court of the United States

CHINA AGRITECH, INC.,
Petitioner,

v.

MICHAEL RESH, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

Washington Legal Foundation (WLF) is a non-profit, public-interest law firm and policy center with supporters in all 50 States.[1] Founded 41 years ago, WLF devotes a substantial portion of its resources to advocating for free-market principles, individual and business civil liberties, limited government, and the rule of law.

To that end, WLF has regularly appeared before this and other federal courts in numerous cases raising issues related to the proper scope of the federal securities laws. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Omnicare, Inc. v. Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318 (2015) (No. 13-435); Brief of the Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014) (No. 13-317).

In particular, WLF has participated in litigation regarding the applicability of the statutes of limitations and statutes of repose for the bringing of securities law claims. *E.g.*, Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Respondents, *Cal. Pub. Emps Ret. Sys. v. ANZ Secs., Inc., et al*, No. 16-373; Brief of Washington Legal

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[1] Pursuant to Rule 37.6 of the Rules of this Court, the undersigned hereby state that no counsel for Petitioner or Respondents authored any part of this brief, and no person other than *amicus curiae* or its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3(a) of the Rules of this Court, letters of consent from all parties to the filing of this brief are on file or have been submitted to the Clerk of the Court.

Foundation as *Amicus Curiae* in Support of Petitioner, *Kokesh v. SEC*, No. 16-529; Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioners, *Timbervest LLC v. SEC*, No. 15-1416 (D.C. Cir. appeal docketed Nov. 13, 2015).

Additionally, WLF's Legal Studies Division, the publishing arm of WLF, has published numerous studies, reports, and analyses on issues related to statutes of limitations and statutes of repose. *See, e.g.*, Eric J. Conn, *OSHA's Midnight Attempt to Overrule Federal Court's Decision Is Ripe for Rescission*, WLF Legal Opinion Letter, Feb. 24, 2017), http://www.wlf.org/upload/legalstudies/legalopinionletter/022417LOL_Conn.pdf.

WLF agrees with Petitioner that the Ninth Circuit's extension of *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), is incorrect and should be reversed because applying the *American Pipe* rule to allow for tolling of otherwise untimely follow-on class actions would undermine the principles of *American Pipe*, and the purpose of statutes of limitations. WLF writes separately to focus on why the Ninth Circuit's extension of *American Pipe* is especially unwarranted in securities class actions like the instant one. Because of equitable considerations specific to securities class actions, equitable balancing militates heavily against applying a tolling rule in such a manner as to allow otherwise time-barred follow-on class actions to be filed by absent class members after certification of an initial securities class action has been denied.

SUMMARY OF ARGUMENT

In the context of securities class action litigation, the equities weigh heavily against applying the Ninth Circuit's extension of *American Pipe* tolling to permit absent class members to subsequently bring otherwise untimely claims on behalf of a class.

Whereas in *American Pipe* the Court identified a significant efficiency benefit that would result from the tolling of *individual* claims – *i.e.*, the avoidance of innumerable protective filings – there are no such benefits from tolling *class* claims in federal securities class actions. As a result of the Private Securities Litigation Reform Act of 1995 ("PSLRA") "lead plaintiff" provisions, there is no realistic prospect that in the absence of tolling, courts will be inundated with protective filings by class members seeking to bring claims on behalf of the class. Indeed, because the PSLRA presumptively permits only the lead plaintiff applicant with the largest damages to oversee the litigation, only a tiny segment of the putative class in any securities class action stands a reasonable chance of being appointed to litigate the class claims.

Individuals who are not among this small group of investors would have no reason to make a protective filing, or otherwise seek to pursue claims on behalf of the class. Moreover, to ensure a follow-on lawsuit filed on behalf of the entire class is not time-barred in the event the court denies certification of the initial class, all that is needed is ***one*** timely protective filing by ***one*** suitable absent class member that adequately preserves its ability to timely pursue claims in a representative capacity. Tolling in these circumstances is not needed or justified.

There also are equitable considerations that militate heavily *against* the Ninth Circuit's tolling rule in the securities litigation context. The rule leads to the filing of serial class actions, and the successive re-litigation of certification determinations. This imposes obvious and undue burdens on defendants.

The tolling rule also subjects defendant companies to undue pressure to prematurely settle securities class actions for inflated, even "extortionate," amounts that do not reflect fundamental weaknesses, including Rule 23 deficiencies, in the actions. Defendants will be discouraged from trying to defeat certification, because doing so once successfully will not be nearly enough – a further series of substantially identical class actions may still follow, which will prohibitively increase defendant companies' litigation costs and risks to the detriment of their investors.

In turn, plaintiffs' attorneys – knowing that fewer defendants will have the resources and resolve to test a succession of class actions – will be encouraged to inappropriately pursue investor claims in the form of putative class actions. This will result in the increased filing of meritless securities class actions, an outcome that Congress specifically sought to avoid when it passed the PSLRA.

Lastly, the Ninth Circuit's tolling rule operates at cross-purposes with the PSLRA. In particular, the Ninth Circuit's tolling rule would result in fragmented and protracted litigation in the securities class action context that would thwart the coordinated, efficient, and streamlined approach created by the PSLRA and that Congress believed would best serve the relevant competing policy and fairness considerations.

ARGUMENT

I. THE EQUITIES WEIGH HEAVILY AGAINST APPLYING THE NINTH CIRCUIT'S TOLLING RULE IN SECURITIES CLASS ACTIONS

As Petitioner has conclusively shown, adopting a tolling rule that would suspend, upon the filing of an initial class action, the applicable statutory deadlines for the filing of subsequent actions on behalf of the class would undermine the principles of *American Pipe* and the purpose of statutes of limitations. *See* Brief for Petitioner ("Petitioner's Brief"), *China Agritech, Inc. v. Resh*, No. 17-432 (U.S. Jan. 22, 2018).

In their Opposition to Petitioner's petition for certiorari, Respondents attempted to sidestep the general problems that extending *American Pipe* tolling would pose for class action litigation. Respondents suggested, *inter alia*, that these problems are not present at all, or at least not to the same degree, in class actions brought under the federal securities laws (such as the instant case brought under the 1934 Act). *See* Respondents' Brief in Opposition at 18-21, *China Agritech, Inc. v. Resh*, No. 17-432 (U.S. Oct. 23, 2017).

Respondents are wrong. In fact, they have it backwards. A balancing of the relevant equities indicates that it would be particularly inappropriate to apply the tolling rule urged by Respondents in federal securities class actions. As the Court has explained, the *American Pipe* tolling rule was "grounded in the traditional equitable powers of the judiciary." *Cal. Pub. Emps. Ret. Sys. v. ANZ Secs., Inc.*, 137 S. Ct. 2042, 2052 (2017). Although *American Pipe* did not explicitly apply "the formal doctrine

of equitable tolling in any direct manner . . . [t]he balance of the Court's reasoning nonetheless reveals a rule based on traditional equitable powers, designed to modify a statutory time bar where its rigid application would create injustice."[2] *Id.* That is to say, in *American Pipe* the Court balanced the equities to determine whether tolling was warranted. *Id.*

The balancing of the equities in *American Pipe* was straightforward and did not lead to a surprising result. The Court regarded the tolling rule as necessary to avoid an outcome in class actions that would be blatantly inefficient. In the absence of tolling, class members would inundate courts with protective filings to insure the preservation of their individual claims in the event the court refused to certify the class. Thus, the tolling rule applied in *American Pipe* (and later applied in *Crown Cork*) "furthered 'the purposes of litigative efficiency and economy' served by Rule 23 . . . [because] [w]ithout the tolling, '[p]otential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable,' which would

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[2] As described by the Court in *ANZ Secs.*, the doctrine of "equitable tolling" is but one "example" of a tolling rule derived from the "traditional power of the courts to 'apply the principles . . . of equity jurisprudence.'" *Id.* at 2050 (citing *Young v. United States*, 535 U.S. 43, 50 (2002)). The equitable tolling doctrine "permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'" *Id.* (citing *Lozano v. Montoya Alvarez*, 134 S. Ct. 1224, 1231-1232 (2014)).

'breed needless duplication of motions.'"[3] *ANZ Secs.*, 137 S. Ct. at 2051 (citing *American Pipe*, 414 U.S. at 553-556); *see also, e.g., Korwek v. Hunt*, 646 F. Supp. 953, 964-965 (S.D.N.Y. 1986), *aff'd*, 827 F.2d 874 (2d Cir. 1987) ("The theory at the heart of the *American Pipe* and *Crown Cork* decisions is that a tolling rule makes sense when it is needed to avoid frustrating the central purpose of class action procedure – efficiency and economy of litigation").

In contrast, the Court in *American Pipe* found no substantial hardships weighing ***against*** tolling under the particular circumstances of that case. Although tolling a statute of limitations can, in some instances, unfairly deprive defendants of the timely notice of claims, the Court in *American Pipe* did not believe the defendants in the case would suffer any such prejudice. "By filing a class complaint within the statutory period, the named plaintiff 'notifie[d] the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment.'" *Id.* at 2051 (citing *American Pipe*, 414 U.S. at 555). Thus, "'the tolling was in accord with 'the functional operation of a statute of limitations.'" *Id.* (citing *American Pipe*, 414 U.S. at 554).

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[3] The Court in *American Pipe* also reasoned that tolling in that case was in accord with "the functional operation of a statute of limitations," *see infra*. *American Pipe v. Constr. Co. v. Utah*, 441 U.S. 538, 554 (1974).

In short, the balancing of the equities in *American Pipe* led the Court to conclude that adopting the tolling rule in question was appropriate *in that case*.[4] There was a clear benefit to adopting the rule, and the Court perceived no adverse hardship to any of the parties (or any adverse public or policy effects) that would result from the rule as applied in the relevant, narrow context.

The balancing of the equities is starkly different in the circumstances present the instant case.[5] Whereas in *American Pipe* the Court identified clear efficiency benefits that would result from tolling, any such efficiency benefits are illusory in the context of a federal securities class action like the instant one subject to the PSLRA.[6] Litigation efficiency and the desire to achieve fairness were Congress's primary

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[4] *See ANZ Secs.*, 137 S. Ct. at 2053 (the equitable considerations taken into account by the *American Pipe* Court were "sufficient in balancing the equities to allow tolling under the antitrust statute").

[5] As the Court observed in *ANZ Secs.*, *see supra*, the tolling rule applied in *American Pipe* was "derive[d]" ***not*** "from legislative enactments," but "from the traditional power of the courts to 'apply the principles . . . of equity jurisprudence." *Id.* at 2050. Any extension of *American Pipe* tolling likewise would have to be "grounded in the traditional equitable powers of the judiciary," and in the Court's exercise of those powers, a balancing of the relevant equities is obviously appropriate. *Id.* at 2052.

[6] It is undisputed this action, which asserts claims under Securities Exchange Act of 1934, is subject to the PSLRA. *See, e.g.*, Brief for Petitioner at 3, *China Agritech, Inc. v. Resh*, No. 17-432 (U.S. Jan. 22, 2018).

purposes in enacting the PSLRA. In light of the procedural realities of securities class action litigation conducted in accordance with the PSLRA, extending the *American Pipe* tolling rule to cover securities class actions would significantly undermine Congress's desire to enhance efficiency and promote fairness.

Moreover, and in contrast with *American Pipe*, there are countervailing factors that weigh strongly ***against*** the tolling of putative class claims (as opposed to individual investor claims). These equitable considerations include, as an initial matter, that tolling would lead to the filing of serial class actions, which would impose obvious and undue burdens on defendants in securities class actions. In addition, and even more significantly, the Ninth Circuit's tolling rule would: (1) result in companies – to the detriment of their investors – being pressured to prematurely settle certain securities class actions for "extortionate" amounts that do not reflect the case's weaknesses, including deficiencies that may render it unlikely the case could satisfy the requirements of Rule 23; (2) incentivize plaintiffs' attorneys to pursue certain individual litigants' claims in the form of putative class actions even when such claims suffer from Rule 23 deficiencies and never should be brought on behalf of a class; and (3) work at cross purposes with key procedural provisions of the PSLRA that reflect public policy and fairness determinations made by Congress that merit consideration in the Court's balancing calculus with regard to tolling in this situation.

A. The Equitable Considerations That Supported the Application of Tolling in *American Pipe* (and *Crown Cork)* Do Not Support Application of the Ninth Circuit's Tolling Rule in the Instant Case

In a securities class action such as this one, there are certain absent class members whose damages claims are so significant – or who for other reasons attach such value to their claims – that if the court refused to certify a class, they likely would pursue their claims by bringing their own individual actions. Without a tolling rule that suspended the limitations period with respect to such individual actions, each of these absent class members may feel compelled to make a protective filing. The tolling ruled applied in *American Pipe* (and later in *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345 (1983)) eliminates the need for such protective filings. It thereby relieves a potentially vast number of class members of the burdens of making protective filings, and furthers "'the purposes of litigative efficiency and economy' served by Rule 23." *ANZ Secs.*, 137 S. Ct. at 2051; *see also Devlin v. Scardelletti*, 536 U.S. 1, 10 (2002) (if *American Pipe* had not suspended the statute of limitations with regard to the individual claims of absent class members, "***all*** class members would be forced to intervene to preserve their claims, and one of the major goals of class action litigation – to simplify litigation involving a large number of class members with similar claims – would be defeated." (emphasis added)); *Korwek*, 646 F. Supp. at 964-965 (it was "contemplated by the Supreme Court in . . . *American Pipe* and *Crown Cork*" that "***hundreds, thousands or tens of thousands*** of indi-

vidual protective filings . . . would likely be invited by a refusal to apply the tolling rule" in *American Pipe* (emphasis added)).[7]

For the reasons explained below, however, there is no similar cause for concern that, in a federal securities class action governed by the PSLRA, individual class members would make innumerable protective filings *seeking to frame their cases as class actions* in the absence of a tolling rule that suspended the applicable limitations periods as to such putative class actions.

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[7] *See also, e.g., In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, 810 F. Supp. 2d 650, 669 (S.D.N.Y. 2011) ("the purpose of *American Pipe* tolling is to disincentivize putative class members from undermining the efficiency and economy policies underlying Rule 23 by ***flooding the court*** with duplicative, protective motions" (emphasis added)), *vacated on other grounds*, 23 F. Supp. 3d 203 (S.D.N.Y. 2014); 3-24 Products Liability Practice Guide § 24.02 (2017) ("The reason for adopting *American Pipe* tolling is the promotion of judicial economy and efficiency—the main reasons for having a class action procedure in the first place. Without tolling, courts would be ***inundated*** with protective motions to intervene or individual complaints filed by putative plaintiff class members seeking to avoid the statute of limitations bar" (emphasis added)).

1. Securities Class Actions are Subject to Procedural Rules That Eliminate Any Prospect That a Large Number of Class Members Would Be Compelled to Make Protective Filings in the Absence of Tolling

There are procedural mechanisms imposed on securities class actions by the PSLRA that, as a practical matter, eliminate any likely prospect that a large number of investors would be compelled to inundate the courts with protective filings absent an extension of *American Pipe* tolling to class actions.

Of particular note here, the PSLRA sets forth a number of procedures relating to the selection of a "lead plaintiff" in class actions arising under the federal securities laws. Under the PSLRA, any class member may move for appointment as lead plaintiff in a securities class action within 60 days of the publication of notice of the pendency of such action. *See* 15 U.S.C. § 78u-4(a)(3)(A)(i)(II) (2010). The lead plaintiff has the responsibility to oversee and supervise the litigation separate and apart from counsel.

The PSLRA directs the court to appoint as lead plaintiff the member of the purported plaintiff class that "the court determines to be most capable of adequately representing the interests of class members," referred to as "the 'most adequate [lead] plaintiff.'" 15 U.S.C. § 78u-4(a)(3)(B)(i)(2010). Significantly, the member of the plaintiff class who applies for lead plaintiff status and suffered the largest financial loss is presumptively the "most adequate lead plaintiff," and in the vast majority of cases, is appointed lead plaintiff. 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I)(bb)-(cc)(2010) (the movant that timely demonstrates it has

"the largest financial interest in the relief sought by the class" and "otherwise satisfies the requirements of Rule 23" is entitled to a presumption that it is the most adequate plaintiff).

Indeed, encouraging sophisticated institutions with a large financial stake in the litigation to serve as lead plaintiff was a critical legislative goal underlying the enactment of the PSLRA. *See, e.g.*, H.R. Conf. Rep. No. 104-369, at 34, reprinted in 1995 U.S.C.C.A.N. 730, 733 (explaining that "increasing the role of institutional investors in class actions will ultimately benefit shareholders and assist courts by improving the quality of representation in securities class actions").[8]

The practical effect of the foregoing lead plaintiff provisions is that, even if the Court does not extend *American Pipe* tolling to securities class actions, there will be very few filings of a protective nature beyond what would be filed in the ordinary course in a securities class action. Because of the PSLRA's stringent lead plaintiff rules, only a very small segment of the putative class in any securities

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[8] *See also Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 321 (2007) (stating that the lead plaintiff "innovation aimed to increase the likelihood that institutional investors—parties more likely to balance the interests of the class with the long-term interests of the company—would serve as lead plaintiffs"); *In re Reliant Sec. Litig.*, No. 02-cv-1810, 2002 U.S. Dist. LEXIS 27777, at *9-10 (S.D. Tex. Aug. 27, 2002) ("Large institutional investors . . . tend to be sophisticated investors capable of controlling attorneys in securities fraud litigation, and the [PSLRA], by emphasizing financial stake, expresses a preference for appointing such investors").

class action would stand any reasonable chance of being appointed lead plaintiff and being permitted to pursue claims on behalf of the class.[9] An investor who is not among this select group of investors would hardly go to the trouble of making a protective *class* filing. Thus, because making a protective filing would be futile for the vast majority of class members, no extension of the *American Pipe* tolling rule is needed to avoid the flood of potentially "hundreds, thousands or tens of thousands of individual protective filings" that the Court sought to avoid by applying a tolling rule in that case.[10] *Korwek*, 646 F. Supp. at 965.

Moreover, among the small group of sophisticated investors in any securities class action who have suffered sufficiently substantial damages to stand a reasonable prospect of securing lead plaintiff status, not even all of those investors would make protective

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[9] In a typical securities class action, many investors never want or need to exercise personal control over the litigation of their own claims because they have relatively small damages. Nor do they want or need to pursue their claims on behalf of the entire putative class of investors (and, indeed, pursuant to the PSLRA's lead plaintiff rules, such investors would stand no chance of being appointed lead plaintiffs in any securities class actions, *see infra*). Finally, their ability to pursue their own individual action is already adequately protected by the *American Pipe* rule.

[10] *See also, e.g., Employers-Teamsters Local Nos. 175 Pension Trust Fund v. Anchor Capital Advisors*, 498 F.3d 920, 925 (9th Cir. 2007) ("*Anchor Capital*") (the PSLRA "certainly was ***not*** intended to allow parties to benefit from tolling when they would not have filed a complaint in the first place" (emphasis in original)).

filings with the court. Because a protective filing by any one of these investors would be public and in some instances accompanied by a widely-dispersed press release in accordance with the PSLRA's notice requirements,[11] all other potential filers would be on notice that a sophisticated investor has already taken measures to preserve the claims on a class-wide basis.

At bottom, the focus of the *American Pipe* decision was on the preservation of each individual absent class member's ability to pursue his or her own claim in the event certification of the initial class action was denied (e.g., for failure to satisfy the typicality and adequate representation requirements of Rule 23(a)(3) and (a)(4)), without requiring each class member to make a protective filing to avoid being time-barred. The number of such protective filings that would be required in the absence of *American Pipe* tolling is potentially vast because each class member would have to make its own filing to protect its ability to later pursue its claim individually. Thus, there might be as many protective filings as there are class members.

By contrast, to ensure a follow-on lawsuit filed on behalf of the entire class is not time-barred in the event certification of the initial class action is denied, all that is needed is ***one*** timely protective filing by ***one*** suitable absent class member that adequately

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[11] Under the PSLRA, once a federal securities class action has been filed by any plaintiff, that plaintiff must, within 20 days, "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice" that advises all class members that a suit has been filed, and the nature of the claims. 15 U.S.C. § 78u- 4(a)(3)(A)(i)(I) (2010).

preserves its ability to timely pursue claims in a representative capacity.[12] Tolling in these circumstances is not needed or justified.

In any event, in the securities class action context and in light of the PSLRA's lead plaintiff provisions (*see supra*), as a practical matter only one or a few sophisticated investors would consider it necessary or desirable to take protective measures to ensure their ability to file claims on behalf of the class, and/or to serve as a class representative. These protective filings might take a number of forms.

First, an investor might institute a case by filing a class action complaint and then seek lead plaintiff status in that case.

Second, an investor might not file its own complaint, but rather seek lead plaintiff status in a case commenced by another investor. Along the same lines, the investor also could wait until the class certification stage of the case, and then file an intervention motion seeking appointment as a class representative in the case. Or the investor can just simply ask class counsel to put the investor forward as a class representative. *See, e.g.*, William B. Rubenstein, Newberg on Class Actions section 2:1 n.8 (5th ed. 2011) ("Class counsel need ***not*** put forward all named plaintiffs, or ***only named plaintiffs***, as proposed class representatives." (emphasis added)).

Third, even if one investor has already filed a class action complaint, a second investor who seeks

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[12] And if just a few other such protective filings were made by a few other absent class members, it would provide a more than adequate safety net in the event one of the protective filings proved defective.

to assert claims on behalf of the class can file its own class action complaint in another appropriate jurisdiction. That second investor might then agree to the consolidation of its case with the first case, but pursue a stay of its case pending the outcome of the first case. In that scenario, if the first investor fails to obtain certification of its class action suit, the second investor can then seek to proceed with its case.

Lastly, but hardly least, an investor who cannot or does not want to secure lead plaintiff status or file its own complaint can still pursue its interest in asserting claims on behalf of the entire putative class by requesting to be included in an existing class action as a named plaintiff asserting claims in a representative capacity. *See, e.g., In re Citigroup, Inc.*, No. 08 Civ. 3095(LTS), 2011 WL 744745, at *1 (S.D.N.Y. Mar. 1, 2011), *aff'd sub nom. Finn v. Barney*, 471 F. App'x 30 (2d Cir. 2012) (noting existence of two parties who were named plaintiffs, but not lead plaintiffs, "assert[ing] claims on behalf of the putative class of investors"). A request can be made either informally,[13] or by formal means (*i.e.*, through an intervention

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[13] Once a lead plaintiff and lead counsel are appointed pursuant to the PSLRA's lead plaintiff provisions, 15 U.S.C. § 78u- 4(a)(3)(B)(i), courts invariably permit the lead plaintiff to file an amended complaint, in large part because it is the lead plaintiff, rather than the plaintiff who initially filed a complaint in the case, who is authorized to exercise control over the litigation as a whole, which includes deciding what claims to assert on behalf of the class. *See, e.g., In re Bank of Am. Corp. Sec. Derivative & Emp't Ret. Income Sec. Act (ERISA)*, No. 09 MDL 2058 (DC), 2010 WL 1438980 at *2 (S.D.N.Y. April 9, 2010). If, at that time, any other investors wish to protect their ability to file claims on behalf of

or joinder motion) by or on behalf of a sophisticated investor seeking to protect its ability to assert claims on behalf of the entire putative class.[14] This request can be made either before the lead plaintiff files the operative complaint in the case, or after. *See generally* Wright & Miller, 6 Fed. Prac. & Proc. Civ., § 1474 (3d ed. 2016) (motions to add a person to a complaint as a named party are permitted by Fed. R. Civ. P. 15 and Fed. R. Civ. P. 21).

It bears emphasis that, as Petitioner has demonstrated, tolling is generally warranted only where, at a minimum, plaintiff has demonstrated diligence. *See, e.g., ANZ Sec.*, 137 S Ct. at 2050-2051 ("the doctrine of equitable tolling . . . permits a court to pause a statutory time limit 'when a litigant has pursued his rights diligently but some extraordinary circumstance prevents him from bringing a timely action.'") (citing *Lozano*, 134 S. Ct. at 1231-1232). Here, a plaintiff who fails to take any of the simple protective measures enumerated above can hardly establish "diligence." Indeed, Respondents here took none of these measures, and cannot show any "diligence" whatsoever. *See* Brief for Petitioner at 11, 37. On this basis alone, tolling is unwarranted.

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the class, they need simply to contact lead counsel and ask to be included in the operative amended class action complaint as named, representative plaintiffs. The PSLRA and Rule 23 contain no obstacles to the addition of non-lead, named representative plaintiffs to an operative securities class-action complaint.

[14] *See, e.g., Anchor Capital*, 498 F.3d at 923 (the denial of an investor's lead-plaintiff motion does "not leave them without a remedy . . . [they have a] host of options [including] fil[ing] a motion for intervention").

In sum, in securities class actions, under the procedural rules imposed by the PSLRA, individual investors have nothing to gain by making countless protective filings that preserve the ability of each investor to file an action in which he or she seeks to bring claims on behalf of the class. As such, in the securities class action setting, investors will not flood courts with protective filings, whether or not there is a tolling rule that suspends the applicable time limitations on the filing of ensuing class actions. At most, extending the *American Pipe* tolling rule to later-filed cases filed by individual class members on behalf of the entire class might prevent a small handful of filings. Thus, in light of the PSLRA (*see infra*), "the purposes of litigative efficiency and economy" that animated *American Pipe* do not support the Ninth Circuit's extension of the *American Pipe* tolling rule.

B. There are Equitable Considerations in PSLRA-Governed Securities Class Actions That Weigh Heavily *Against* the Tolling of Securities Class Actions

There are multiple equitable considerations in this and other securities class actions subject to the PSLRA that also militate ***against*** the application of the tolling rule relied upon by the Ninth Circuit below. As explained in detail below, the most notable of these equitable considerations are as follows:

First, the Ninth Circuit's tolling rule will lead to the filing of serial class actions, which will impose obvious and undue burdens on defendants in securities class actions.

Second, the tolling rule would unfairly pressure companies – to the detriment of their investors – to

prematurely settle certain securities class actions for inflated, even "extortionate," amounts that do not reflect the case's weaknesses, including deficiencies that may render it unlikely the case could satisfy the requirements of Rule 23. As such, the Ninth Circuit's tolling rule incentivizes plaintiffs' attorneys to inappropriately pursue certain individual litigants' claims in the form of putative class actions, thereby leading to the increased filing of meritless securities class actions.

Lastly, the Ninth Circuit's tolling rule works at cross purposes with key procedural provisions of the PSLRA that reflect public policy and fairness determinations made by Congress that merit consideration in the Court's balancing calculus with regard to tolling in the instant case.[15]

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[15] As the Court underscored in *American Pipe*, when courts consider whether "in a given context" tolling a statute of limitations is appropriate, the relevant "legislative scheme" – in addition to considerations of fairness – should be taken into account. *American Pipe*, 414 U.S. 538, 558 (1974) (in deciding whether to apply a tolling rule, a court must, *inter alia*, determine "whether tolling the limitation in a given context is consonant with the legislative scheme"); *ANZ Secs.*, 137 S. Ct. at 2053 (the equitable considerations taken into account by the *American Pipe* Court were "sufficient in balancing the equities to allow tolling ***under the antitrust statute***" (emphasis added)). Thus, in the Court's exercise of its equitable powers in determining whether tolling should apply in the instant case, it is appropriate to consider the effects of tolling in light of the PSLRA and the underlying policy and fairness considerations embodied in the PSLRA that prompted its passage by Congress. Congress itself considered issues of fundamental fairness in determining that the PSLRA and its procedural protections were necessary, and carefully fashioned the contours of the

1. The Ninth Circuit's Extension of the *American Pipe* Tolling Rule Encourages Plaintiffs' Lawyers in Securities Litigation to Serially File Duplicative Class Actions

As Petitioner has shown, extending *American Pipe* tolling to permit class actions to be filed outside the applicable limitations period will lead to the filing of serial, duplicative class actions, contrary to the principles of *American Pipe* and the purpose of statutes of limitations. *See* Petitioner's Brief. In their Opposition to China Agritech's Petition for a Writ of Certiorari, Respondents suggested that in the securities litigation context, the problem of serial class actions does not exist, or the severity of that problem is greatly diminished, because securities claims are subject to statutes of repose, which this Court has held are not subject to equitable tolling. *See* Respondents' Brief in Opposition.

Respondents are mistaken. Despite the existence of statutes of repose, and the Court's decision in *ANZ Securities*, the tolling rule applied by the Ninth Circuit below still opens the door to serial class actions in cases filed under the 1934 Act (under which the claims in this action were brought) and even the Securities Act of 1933 (the "1933 Act") (under which the claims in *ANZ Securities* arose) that otherwise would be time-barred by the applicable statutes of limitations.

PSLRA to reflect an appropriate balancing of the fairness interests of all litigants, including plaintiffs who seek to pursue meritorious securities claims. *See infra*.

This case itself proves the point. Claims brought under the 1934 Act, like the claims in the instant case, are subject to a 5-year statute of repose. Yet the instant case is the third identical class action brought on behalf of shareholders of China Agritech alleging violations of the 1934 Act. Not only were Respondents able to file a third identical class action prior to the expiration of the statute of repose, class counsel would have been able to add one or more additional class actions had this case not been on appeal for three years.

It therefore is beyond dispute that, in the context of the 1934 Act, extending *American Pipe* tolling will permit plaintiffs' attorneys to file, in serial fashion, multiple securities class actions. Although the 1933 Act has a shorter repose period (3 years), there plainly is enough time even within that period for more than one class action to be filed. This is especially true since Rule 23 of the Federal Rules of Civil Procedure "requires the court to determine, as early in the proceedings as may be practicable, whether an action brought as a class action is to be so maintained." Fed. R. Civ. P. 23 (c)(1)(A) advisory committee's note to 1966 amendment; *see also American Pipe*, 414 U.S. at 562 (Blackmun, J., concurring) ("Rule 23(c)(1), of course, provides that the court shall decide whether a class action may be maintained '[a]s soon as practicable after the commencement of an action.' This decision, therefore, will normally be made expeditiously").

The Ninth Circuit's tolling rule would increase the likelihood that any defendant in a securities class action would ultimately face a series of duplicative or closely overlapping class actions. Needless to

say, this increased exposure to class actions would, in and of itself, increase the litigation burdens that companies and persons named in securities class actions confront, and these burdens must be considered in weighing the equities of applying a tolling rule in this case.

2. The Ninth Circuit's Tolling Rule Increase Opportunities for Plaintiffs' Lawyers to Seek the "Extortionate Settlements" and File the Meritless Securities Class Actions That Congress Specifically Sought to Curb Through Passage of the PSLRA

One year after this Court's *American Pipe* decision, the Court issued its decision in *Blue Chip Stamps*. There, the Court recognized that due to incentives to bring weak securities cases under Section 10(b) of the 1934 Act and for companies to settle those cases, securities class action litigation posed "a danger of vexaciousness different in degree and in kind from that which accompanies litigation in general." *Blue Chip Stamps v. Mamore Drug Stores*, 421 U.S. 723, 739 (1975).

Twenty years later, in an effort largely to address these same dangers in a broad range of securities lawsuits, Congress enacted the PSLRA.[16] The PSLRA was prompted by Congress's fears that the

[16] The PSLRA amended the 1933 Act and 1934 Act by establishing a number of procedural protections that apply largely to misstatement claims brought under those federal securities statutes.

"private securities litigation system" was being "undermined by those who seek to line their own pockets by bringing abusive and meritless suits." H.R. Conf. Rep. No. 104-369, at 31, reprinted in 1995 U.S.C.C.A.N. 730, 730 (1995). Among other concerns animating the passage of the PSLRA were, *inter alia*, "nuisance filings, targeting of deep-pocket defendants, [and] vexatious discovery requests," – abuses that "had become rampant" in the years leading up to the PSLRA. *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 81 (2006) (quoting H.R. Conf. Rep. No. 104-369, at 31).

Of particular concern to Congress was that litigation abuses often "resulted in extortionate settlements . . . ultimately harming the very people the securities laws were meant to protect: investors."[17]

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[17] Unduly large settlements obviously are detrimental to the interests of a company's current investors. Indeed, they are detrimental to many members of the putative members of a class, because in many instances class members are still investors – *i.e.*, they continue to own shares of the company. *See, e.g., SEC v. Texas Gulf Sulphur Co.*, 401 F.2d 833, 867 (2d Cir. 1968) (Friendly, J., concurring) (securities fraud litigation carries the risk of "large judgments, payable in the last analysis by innocent investors, for the benefit of speculators and their lawyer."); Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 STAN. L. REV. 1487, 1503 (1996) ("payments by the corporation to settle a class action amount to transferring money from one pocket to the other, with about half of it dropping on the floor for lawyers to pick up"); 141 Cong. Rec. H2749-02, at H2753 (1995) (in securities "strike suits," harms to companies as well as their investors greatly overshadow any settlement recoveries by investor class members).

See H.R. Conf. Rep. No. 104-369, at 31-32.[18] The curtailment of such "extortionate settlements" was among the chief intended effects of the PSLRA. *Id.*; *see also Dabit*, 547 U.S. at 80-81. This concern with "extortionate settlements" pre-dated the PSLRA, and persists even after its passage. *See, e.g., Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (noting "numerous courts and scholars have warned that settlements in large [securities] class actions can be divorced from the parties' underlying legal positions"); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 164 (3d Cir. 2001) (discussing the "inordinate or hydraulic pressure on [securities fraud] defendants to settle, avoiding the risk, however small, of potentially ruinous liability"); *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002) (discussing circumstances that "lead[] defendants to pay substantial sums even when the plaintiffs have weak positions").

Adopting the Ninth Circuit's tolling rule in the context of securities class actions would undermine Congress's foregoing policy objectives – and the fairness considerations underlying those objectives – in enacting the PSRLA. In particular, the rule would (1) increase the incentive for plaintiffs' attorneys to file

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[18] *See also, e.g.*, H.R. Rep. No. 105-640, at 9 (1998) (Congress passed the PSLRA with the hopes of "put[ting] an end to vexatious litigation that was draining value from the shareholders and employees of public companies").

weak class actions,[19] and inappropriately pursue inflated settlements in connection with those cases, and (2) impose new pressures on defendant companies – to the detriment of their investors (many of whom are putative class members in any purported class action filed against the companies) – to prematurely settle the cases for inflated amounts that do not accurately reflect the defects in the cases, including defects that would preclude the plaintiffs from ultimately satisfying Rule 23's certification requirements.

If the Court were ***not*** to adopt the tolling rule of the Ninth Circuit, a plaintiff whose prospects of satisfying the requirements of Rule 23 are poor would have little incentive to frame its lawsuit as a class action. Moreover, even if the plaintiff still elected to file a suit on behalf of other shareholders, and secured lead plaintiff status, the reasonable settlement value of plaintiff's case would be appropriately diminished by the odds that a court would eventually refuse to certify the class.

If, however, the Court were to adopt the Ninth Circuit's tolling rule, it would increase the probability that the foregoing hypothetical plaintiff would file his or her meritless class action lawsuit anyway, notwithstanding its Rule 23 (and any other) weaknesses, because the settlement value of that plaintiff's case

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[19] In the class action context, a case can be weak in at least one of two ways. It can be weak in that the individual claims of the lead plaintiff are weak. It also can be weak in that the claims asserted by the lead plaintiff are not appropriate for class action treatment – in other words, the case is weak from the standpoint of Rule 23. In enacting the PSLRA, Congress undoubtedly was focused on both kinds of weak cases.

would be inflated by the possibility of subsequent filings.[20] From the defendants' perspective in this scenario, even if they defeat certification of the plaintiff's lawsuit, another one will spring up in its place, and even if that one is defeated too, yet another one may follow, and so on and so on (until the applicable statute of repose precluded the filing of any new actions). The defendants thus will be under increased pressure to settle, and more vulnerable to demands to settle the initial case for an inflated amount to avoid the otherwise certain burdens of defending a series of class actions.

In short, extending *American Pipe* tolling in the manner urged by Respondents would add an additional increment to the *in terrorem* effect of the filing of a securities class action complaint. Any person who might otherwise be deterred from filing a deficient complaint will be incentivized to do so by the prospect that the person might obtain some additional incremental measure of recovery through settlement simply by leveraging the possibility that the defendants will face a protracted series of class actions.

Adopting a tolling rule that leads to these results is obviously inequitable – and, from the standpoint of the relevant "legislative scheme," particularly inappropriate, given Congress's express intention to curb extortionate settlements and the filing of

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[20] *Cf. American Pipe*, 414 U.S. at 561 (Blackmun, J., concurring) (recognizing that the tolling rule applied by the Court might impact litigation behavior, in that it could "be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action").

non-meritorious "strike suits." Putting issuers in a position wherein it is no longer sufficient to defeat a case at class certification – *i.e.*, establish the infirmities of a class action – but instead they must relitigate the same class action multiple times, is a form of oppression that runs squarely counter to the PSLRA's basic objectives.

3. The Ninth Circuit's Tolling Rule Would Undermine PLSRA Requirements for a Regimented, Coordinated, and Streamlined Approach to the Litigation Process for Securities Class Action Litigation That Reflects Important Public Policy and Fairness Considerations

The Ninth Circuit's tolling rule also works at cross purposes with key procedural provisions of the PSLRA that reflect public policy and fairness determinations made by Congress. *See, e.g.*, 141 Cong. Rec. S17933-04, at S17954 (1995) (Conf. Rep.) (PSLRA will "help restore integrity and fairness to the country's private securities litigation system"); S. Rep. 104-98, at 4, reprinted in U.S.C.C.A.N. 679, at 683 (1995) (Congress intended for the PSLRA to "return some fairness and common sense to our broken securities class action litigation system"). These determinations merit significant consideration in the Court's equitable balancing calculus with regard to tolling in the instant case and other securities class actions.

As previously noted, the Ninth Circuit's tolling rule unquestionably would lead to the filing of serial class actions. *See* Petitioner's Brief. This would result in a fragmented and protracted approach to class

action litigation that is squarely at odds with the coordinated and streamlined approach to securities class action litigation contemplated by the PSLRA.[21] In adopting that approach, Congress already carefully balanced relevant competing policy and fairness considerations at issue. *See, e.g.*, H. R. Conf. Rep. No. 104-369, at 39 (recognizing "the need to reduce significantly the filing of meritless securities lawsuits without hindering the ability of victims of [securities] fraud to pursue legitimate claims").

The specific provisions of the PSLRA whose objectives would be undermined by the Ninth Circuit's position include provisions that (1) mandate that once an initial class action is filed, notice must be provided

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[21] For the reasons discussed herein, the primary policy and equitable considerations underlying the PSLRA are at odds with the Ninth Circuit's rule that permits the filing, *in seriatim* fashion, of otherwise untimely class actions following the failure of an initial lead plaintiff to obtain certification of the initial class action. The PSLRA is *not*, however, similarly inconsistent with the application of the *American Pipe* rule – *i.e.*, the tolling of the applicable limitations periods merely with regard to individual actions brought by individual class members. Indeed, as a general matter, in enacting the PSLRA, Congress was not focused on individual actions, but on class actions. *See, e.g.*, Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 DUKE L.J. 1251, 1302 (2002) ("Frivolous litigation generates social costs wherever it exists, but these costs are particularly acute in the class action setting because the scale of the class action magnifies the adverse effects"); 141 Cong. Rec. S17933-04, at S17948 (1995) (the "sole focus of this legislation [*i.e.*, the PSLRA] is lawsuits brought by private investors as part of a ***class action proceeding***" [*i.e.*, not investor lawsuits brought as individual actions] (emphasis added)).

to all investors;[22] (2) require any investor who wishes to lead a class action step forward at a very early stage and apply for "lead plaintiff" status,[23] (3) require courts to promptly appoint a lead plaintiff, so that a leadership structure for the initial class action and related class actions is in place as soon as possible;[24] (4) confer responsibility on the lead plaintiff to

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[22] As noted *supra*, under the PSLRA, once a federal securities class action complaint has been filed by any plaintiff, that plaintiff must, within 20 days, "cause to be published, in a widely circulated national business-oriented publication or wire service, a notice" that advises all class members that the suit has been filed, and the nature of the claims. 15 U.S.C. § 78u-4(a)(3)(A)(i)(I) (2010).

[23] The PSLRA reflects a clear policy choice by Congress to encourage investors who wish to bring claims on behalf of a class to come forward early. The PSLRA imposes a 60-day deadline for filing motions seeking lead plaintiff appointment, and courts strictly enforce that deadline to ensure that a leadership structure for the case and related cases is put in place "as quickly as possible." *Lax v. First Merchs. Acceptance Corp.*, 1997 WL 461036, at *4 (N.D.Ill. Aug. 11, 1997); *see also, e.g. Reitan v. China Mobile Games & Entm't Grp., Ltd.*, 68 F. Supp. 3d 390, 396 (S.D.N.Y. 2014) ("[t]he PSLRA's statutory text . . . evinces Congress's desire to have lead plaintiffs appointed ***as soon as practicable***" (emphasis added)). Of note, courts do not require a new lead plaintiff notice to be published each time a complaint is amended, because a contrary rule would repeatedly reopen the lead plaintiff appointment process. *See, e.g., In re Telxon Secs. Litig.*, 67 F. Supp. 2d 803, 819 (N.D. Ohio 1999); *Lax*, 1997 WL 461036, at *4.

[24] The PSLRA requires courts to appoint a "lead plaintiff" within 90 days of the publication of the required notice. 15 U.S.C. § 78u-4(a)(3)(B)(i) (2010).

exercise oversight responsibility over the litigation of the class action;[25] (5) require courts to consider the consolidation of certain related securities class actions;[26] and (6) impose severe time limitations on, and/or otherwise encourages prompt consideration of submissions made with regard to various procedural and substantive matters in the case.[27] *See supra.*

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[25] *In re Bank of Am. Corp. Sec. Derivative*, 2010 WL 1438980 at *2 (citing *Hevesi*, 366 F.3d at 82 n.13) ("[I]n a securities class action, a lead plaintiff is empowered to control the management of the litigation as a whole . . . . Permitting other plaintiffs to bring additional class actions [after the lead plaintiff is appointed in the initial class action], with additional lead plaintiffs and additional lead counsel, would interfere with Lead Plaintiff's ability and authority to manage the [action]"); *see also, e.g., id.* (under the PSLRA, the lead plaintiff "ha[s] the authority to decide what claims to assert on behalf of the class"); William B. Rubenstein, Newberg on Class Actions §§ 3:52, 10:13 (5th ed. 2011); 15 U.S.C. § 78u-4(a)(3)(B)(v) (2012) (lead plaintiff has responsibility to "select and retain counsel to represent the class").

[26] The PSLRA directs courts to consider any motion for consolidation if "more than one action on behalf of a class asserting substantially the same claim or claims arising under this Chapter has been filed." 15 U.S.C. § 78u-4(a)(3)(B)(ii) (2010).

[27] These time limitations do not simply value efficiency for its own sake. They also provide further support for Congress's twin goals of "encourag[ing] defendants to fight abusive claims" and deterring settlements that are based merely on the "economics of litigation" rather than the merits. *See* S. Rep. 104-98, 6-7, 1995, reprinted at U.S.C.C.A.N. 679, 685-86; *see also id.* at 713 (lamenting that "innocent corporations [were] subject to expensive and time consuming litigation" and seeking to enable "early dismissal of abusive securities suits").

CONCLUSION

For the reasons set forth above, a balancing of the relevant equities and consideration of the interests of justice compel the conclusion that in the securities class action context, it would be unwarranted – indeed, impose adverse collateral consequences – to extend *American Pipe* tolling to allow the filing of otherwise untimely class actions. In PSLRA-governed actions, the interests of justice generally – and fairness to investors and issuers in particular – strongly militate in favor of preventing serial class actions from being filed beyond the statutorily-mandated period of limitations. The Ninth Circuit tolling rule also would operate at cross-purposes with PSLRA provisions designed to (1) minimize the potential for litigation abuses, (2) protect investors and companies from extortionate settlements and frivolous cases, and (3) impose a regimented and streamlined approach to the litigation of securities class actions. In sum, extending *American Pipe* tolling as the Ninth Circuit did is not appropriate in any context, least of all in the context of securities class action litigation. *Amicus Curiae* Washington Legal Foundation therefore respectfully urges the Court to reverse the decision below.

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